

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JULIUS BRADFORD,  
Petitioner,

v.

CALVIN JOHNSON, *et al.*,  
Respondents.

Case No. 2:13-cv-01784-RFB-EJY

## **ORDER DENYING MOTION FOR STAY PENDING APPEAL**

In this habeas corpus action, on July 21, 2021, the Court entered an order granting habeas corpus relief to the petitioner, Julius Bradford, and the Court's judgment to that effect was entered on the same date (ECF Nos. 166, 167). Bradford, represented in this action by appointed counsel, is incarcerated at Nevada's High Desert State Prison, where he is serving prison sentences that in their aggregate amount to life with the possibility of parole after forty years on convictions in Nevada's Eighth Judicial District Court (Clark County) of first-degree murder with use of a deadly weapon and attempted robbery with use of a deadly weapon. The Court granted Bradford relief relative to Ground 2 of his second amended habeas petition, in which he claims that his federal constitutional rights were violated because his trial counsel was ineffective "for failing to advise Mr. Bradford that he faced the death penalty if he did not accept the state's plea bargain offers." Second Am. Pet. at 23–26, ECF No. 67. The Court denied Bradford's other claims, without prejudice, as moot.

In the order granting Bradford's petition on Ground 2, the Court described the pertinent factual background as follows:

Before the first trial in the Zambrano-Lopez case, the State offered Bradford a plea deal whereby Bradford would have pleaded guilty to second-degree murder with use of a deadly weapon and conspiracy to commit robbery in this case, the Zambrano-Lopez case, and second-degree murder with use of a deadly weapon and conspiracy to commit robbery in another case, the Limongello case, and the State would have recommended concurrent prison sentences with parole possible after twenty years. See Tr. of Proceedings, Ex. 49, at 13–15, ECF No. 25-6. Sean Sullivan, the attorney who represented Bradford at his first trial in the Zambrano-Lopez case, advised Bradford to accept the State's offer, but Bradford declined it. See id.; Second Am. Pet. at 24, ECF No. 67; Decl. of Julius Bradford, Ex. 167, at 1, ECF No. 34-13. Bradford claims, though, that Sullivan did not sufficiently investigate the Limongello case before advising him about the plea offer, and that Sullivan did not advise him that if he declined the offer and was convicted in the Zambrano-Lopez case, the State could seek the death penalty in the Limongello case and could use the conviction in the Zambrano-Lopez case as an aggravating circumstance, and Bradford could be sentenced to death. See Second Am. Pet. at 24–25, ECF No. 67; Decl. of Julius Bradford, Ex. 167, at 1, ECF No. 34-13.

Bradford went to trial in the Zambrano-Lopez case and was convicted, and later he was charged with the Limongello murder, was tried in that case, and was convicted of first-degree murder; the conviction in the Zambrano-Lopez case was used as an aggravating circumstance in the Limongello case, and he was sentenced to death. See Judgment of Conviction, Ex. 165, ECF No. 34-11. The Nevada Supreme Court subsequently reversed Bradford's conviction in the Limongello case and remanded the case for a new trial; Bradford's retrial has not yet commenced. See Order of Reversal and Remand, Ex. 244, ECF No. 148-43. Bradford represents that the State is seeking the death penalty at the retrial. See Notice of Intent to Seek the Death Penalty, Ex. 223, ECF No. 148-22; Reply at 29, ECF No. 116.

Order entered July 20, 2021, pp. 11–12, ECF No. 166.

The Court held an evidentiary hearing on Ground 2 on June 11, 2021. Based upon the testimony at the evidentiary hearing, the Court found that Sullivan performed unreasonably because he did not sufficiently investigate the Limongello case before advising Bradford regarding the State's plea offer, and because Sullivan did not advise Bradford that the State could seek the death penalty against him in the Limongello case. Id. at 17. The Court found that Sullivan did not realize, and did not advise Bradford, that a conviction in the Zambrano-Lopez case could be used as an aggravating circumstance in support of imposition of the death penalty in the Limongello case. Id. The Court found that Sullivan did not advise Bradford that he could face a death sentence in the Limongello case, and that entering the offered plea agreement could eliminate that possibility. Id. The Court found that Bradford was prejudiced by Sullivan's unreasonable performance in that

1 there is a reasonable probability that had he been advised that the State could seek the  
 2 death penalty against him in the Limongello case, he would have accepted the State's  
 3 offer and pleaded guilty under the resulting plea agreement, the plea agreement would  
 4 have been presented to the court, and the court would have accepted its terms, resulting  
 5 in convictions of second-degree murder instead of first-degree murder, resulting in less  
 6 severe prison sentences, and removing the possibility of the death penalty in the  
 7 Limongello case. Id. In addition, the Court found that Bradford's counsel in his state post-  
 8 conviction habeas action was ineffective for not asserting the claim in Ground 2. Id. at  
 9 17–18. Therefore, the Court determined that Bradford overcame the procedural default  
 10 of Ground 2 under Martinez v. Ryan, 566 U.S. 1 (2012), allowing this Court to resolve that  
 11 claim de novo.

12       In granting relief to Bradford, the Court ordered that “Respondents shall, within 7  
 13 days ... extend to Petitioner the same plea offer that he received before his first trial  
 14 in the Zambrano-Lopez case and allow Petitioner at least 7 days to either accept or  
 15 decline that offer.” Order entered July 20, 2021, p. 20, ECF No. 166. The Court explained  
 16 its intention in granting this relief:

17       Here, the Court’s intention is to grant Bradford relief that will put him  
 18 in the position he would be in had his counsel reasonably advised him  
 19 regarding the plea offer made by the State prior to the first trial in the  
 20 Zambrano-Lopez case, had he accepted that offer, and had the trial court  
 21 approved it. This Court finds that, had he not received ineffective assistance  
 22 of counsel, Bradford would now be convicted, upon guilty pleas, of second-  
 23 degree murder with use of a deadly weapon and conspiracy to commit  
 24 robbery in both the Zambrano-Lopez case and the Limongello case, and he  
 25 would be serving concurrent prison sentences with parole possible after  
 twenty years. Bradford seeks to have the Court issue a writ of habeas  
 corpus “directing the State to reoffer him the global plea deal.” Pet’s  
 Prehearing Brief, ECF No. 150, at 28. The Court determines that the remedy  
 requested by Bradford is appropriate, and that it should be adequate, and  
 the Court will grant such relief. See Lafler, 566 U.S. at 162–75. If this relief  
 proves to be inadequate to put Bradford in the position he would be in had  
 he not received ineffective assistance of counsel, Bradford may make an  
 appropriate motion to modify the judgment.

26 Id. at 18–19.

27       On July 22, 2021, Respondents filed an Emergency Motion for Stay of Judgment  
 28 Pending Appeal (ECF No. 168). On July 23, 2021, the Court stayed the requirement that

1 the State extend the plea offer to Bradford within seven days, pending the resolution of  
 2 the motion for stay pending appeal, and the Court set an expedited briefing schedule on  
 3 that motion (ECF No. 169). Bradford filed an opposition to the motion on July 26, 2021  
 4 (ECF No. 170), and Respondents replied on July 28, 2021 (ECF No. 171).

5 “Unless a court issues a stay, a trial court’s judgment … normally takes effect  
 6 despite a pending appeal.” Coleman v. Tollefson, 575 U.S. 532, 539 (2015). Under certain  
 7 circumstances, however, a federal district court may stay a judgment pending an appeal.  
 8 See Fed. R. App. 8(a)(1)(A). The moving party bears the burden of persuading the court  
 9 that a stay is appropriate. See Nken v. Holder, 556 U.S. 418, 433–34 (2009). A stay  
 10 pending appeal is not a matter of right. Id.

11 When evaluating whether to issue a stay pending appeal, a court is to consider  
 12 four factors: “(1) whether the stay applicant has made a strong showing that he is likely  
 13 to succeed on the merits; (2) whether the applicant will be irreparably injured absent a  
 14 stay; (3) whether issuance of the stay will substantially injure the other parties interested  
 15 in the proceeding; and (4) where the public interest lies.” Hilton v. Braunschweig, 481 U.S.  
 16 770, 776 (1987). The balance of the factors “may depend to a large extent upon  
 17 determination of the State’s prospects of success in its appeal.” Id. at 778; see also  
 18 Haggard v. Curry, 631 F.3d 931, 935 (9th Cir. 2010) (“The most important factor is the  
 19 first, that is, whether the state has made a strong showing of likely success on the merits  
 20 of its appeal of the district court’s decision.”). “Where the State establishes that it has a  
 21 strong likelihood of success on appeal, or where, failing that, it can nonetheless  
 22 demonstrate a substantial case on the merits, [a stay] is permissible if the second and  
 23 fourth factors in the traditional stay analysis militate against [immediately putting the  
 24 judgment into effect].” Hilton, 481 U.S. at 778.

25 Therefore, in ruling on motions for stay pending appeal, courts employ “two  
 26 interrelated legal tests’ that ‘represent the outer reaches of a single continuum.’” Golden  
 27 Gate Restaurant Ass’n v. City and Cty. of San Francisco, 512 F.3d 1112, 1115 (9th Cir.  
 28 2008) (quoting Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983)). “At one end of the

1 continuum, the moving party is required to show both a probability of success on the  
2 merits and the possibility of irreparable injury" if a stay is not granted. Id. (quoting Lopez).  
3 "At the other end of the continuum, the moving party must demonstrate that serious legal  
4 questions are raised and that the balance of hardships tips sharply in its favor." Id.  
5 (quoting Lopez). "These two formulations represent two points on a sliding scale in which  
6 the required degree of irreparable harm increases as the probability of success  
7 decreases." Id. (quoting Natural Res. Def. Council, Inc. v. Winter, 502 F.3d 859, 862 (9th  
8 Cir. 2007)).

9 In this case, in their motion (ECF No. 168), Respondents articulate no ground  
10 whatsoever for an appeal. Even in their reply (ECF No. 171), filed after Bradford pointed  
11 out this shortcoming of their motion, Respondents did not attempt to describe any ground  
12 for an appeal. Therefore, Respondents wholly fail to show a "probability of success on the  
13 merits," or that "serious legal questions are raised." This, alone, is reason to deny  
14 Respondents' motion.

15 But moreover, Respondents do not show any "possibility of irreparable injury" or  
16 that "the balance of hardships tips sharply in [their] favor."

17 Bradford points out that "[i]f the judgment goes into effect, the most likely result is  
18 that the State will formally reoffer Mr. Bradford the March 2004 plea deal; Mr. Bradford  
19 will accept the offer; the state court will accept the plea; it will vacate his existing  
20 convictions in the Zambrano-Lopez case; it will convict him of second-degree murder with  
21 use of a deadly weapon and conspiracy to commit robbery in both the Zambrano-Lopez  
22 case and the Limongello case; and it will sentence him on both cases to an aggregate  
23 sentence of either 20 to 50 years or 20 years to life." Opp. to Motion for Stay, p. 6, ECF  
24 No. 170. Under this scenario, according to Respondents, Bradford will remain in prison  
25 until at least 2024, when he would become eligible for parole. See Motion for Stay, p. 4,  
26 ECF No. 168.

27 Respondents argue that if the judgment is put into effect, and if the plea offer is  
28 extended and accepted by Bradford, the State would be irreparably injured, but

1 Respondents' argument in this regard is without any cogent explanation. See Motion for  
2 Stay, pp. 3–4, ECF No. 168. Respondents simply argue that if the plea offer is extended  
3 and Bradford accepts it, his pleas of guilty to second-degree murder, and the resulting  
4 judgments of conviction, would be "difficult, if not impossible," to undo. Motion for Stay, p.  
5 3, ECF No. 168; see also Reply in Support of Motion for Stay, p. 4, ECF No. 171  
6 ("exceedingly difficult to undo"). Respondents do not explain why, if they are successful  
7 on an appeal from the judgment in this case, the Court of Appeals would be unable to  
8 craft appropriate relief on their behalf—perhaps involving reimposition of the first-degree  
9 murder conviction in the Zambrano-Lopez case and the vacating of the second-degree  
10 murder conviction in the Limongello case.

11 In considering the question of possible irreparable injury to the State if the  
12 judgment in this case is not stayed pending appeal, it is important to keep in mind that  
13 the judgment in this case simply requires the State to extend to Bradford the same offer  
14 that the State previously extended to Bradford. The State appears intent on proceeding  
15 with the capital trial of Bradford in the Limongello case, and considers it irreparable injury  
16 if it cannot do so immediately, despite its previous offer to settle that case with a guilty  
17 plea by Bradford to second-degree murder, and despite this Court's determination that  
18 Bradford would not be in a position to face that capital trial were it not for unconstitutionally  
19 ineffective assistance of his counsel. Respondents make no showing that precluding any  
20 capital trial in the Limongello case, at least pending the conclusion of an appeal in this  
21 case, would amount to irreparable injury to the State. Rather, in this Court's view,  
22 precluding that trial, at least pending the final resolution of this case on appeal, protects  
23 Bradford from part of the effect of the ineffective assistance of counsel found by this Court.

24 Respondents also argue that "staying the judgment is also proper because the  
25 public interest favors finality of convictions, meeting the fourth Hilton factor." See Motion  
26 for Stay, p. 4, ECF No. 168. The Court finds that this argument is without merit. There is  
27 no conviction in the Limongello case. In the Zambrano-Lopez case, while there is a  
28 judgment of conviction, this Court has found that conviction to be tainted by

1 unconstitutional ineffective assistance of counsel. Under these circumstances, a stay  
2 pending appeal would not serve the public's interest in finality of convictions.

3 In sum, the Court determines that Respondents have not made a showing that a  
4 stay pending appeal is warranted.

5 **IT IS THEREFORE ORDERED** that Respondents' Emergency Motion for Stay of  
6 Judgment Pending Appeal (ECF No. 168) is **DENIED**.

7 **IT IS FURTHER ORDERED** that the stay of the judgment pending resolution of  
8 Respondents' Emergency Motion for Stay of Judgment Pending Appeal (see ECF No.  
9 169 ("[T]he portion of the Court's Order [ECF No. 166] requiring the State to offer Mr.  
10 Bradford a plea offer by July 27, 2021 is stayed pending the Court's resolution of the  
11 Emergency Motion to Stay.")) is lifted. The Court's judgment will go into effect as of the  
12 entry of this order. The State is directed to make the plea offer referenced in the Court's  
13 prior Order (ECF No. 166) by **August 10, 2021**.

14  
15 DATED: August 3, 2021.

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19 RICHARD F. BOULWARE, II  
20 UNITED STATES DISTRICT JUDGE  
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